84-1716

Office-Supreme Court, U.S.
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APR 16 1985
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 19 __

OWEN WILSON, et al, on behalf of themselves and all others similarly situated, Petitioners

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM, et al

Respondents

PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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39 pp

QUESTIONS PRESENTED

1. In view of this Courts' recent cases on the subject does the exemption from the Sherman Antitrust Act, as amended, by the McCarran-Ferguson Act relating to insurance companies still apply only to the "business of insurance", except when there is no lawful state regulation, and not to the "business of insurance companies", inter company action, such as mergers?

2. Where there is a state law that appears to include interstate regulation of insurance companies but cannot owing to jurisdictional disability, does this fall short of McCarran-Ferguson Act amendment to the Sherman Antitrust Act, as amended, requiring valid state regulation, thus eliminating the insurance company exemption as to "business of insurance"?

3. When there are clear accomplished violations of the Sherman Act as amended, involving, A. Interlocking directors and officers in acquired competing companies. B. Horizontal restraint through complete elimination of three directly competing companies through acquisition of 100% of all assets of one full line life, health and hospitalization insurance company and stock control of of two other similar companies, along with, C. 100% stock control of a life and health insurance company holding corporation, does the McCarran exemption provide complete emmunity where all the action taken was intercompany?

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PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Plaintiffs: Owen Wilson Mary Dorsey, Novella Jones, Judith Thomas, Rodell Baker, Maxine Rawlings, Daisey Richardson, Louise Cunningham, Winston Realty Corporation, The class policyholders of Mutual Benefit Society of Baltimore City and minority stockholders of American Citizens Life Insurance Corporation of Washington, D. C.

Defendants: North Carolina Mutual Life Insurance Company of Durham, N. C., Southern Life Insurance Comany of Baltimore City, Midwest Underwriters, Inc., W. J. Kennedy, III, Milton Branch, Maceo A. Sloan, Harold Davis, Wayne W. Perry, Cicero M. Green, Jr., Harry O. Wilson, Jr. (now deceased), Dennis Stackhouse, H. L. Wilson, Helen Wilson and David Wilson.

TABLE OF AUTHORITIES

Cases:	Page
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Miscellaneous:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19 ___

No. _____

OWEN WILSON, ET AL, on behalf of themselves and all others similarly situated, Petitioners

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM, ET AL Respondents

---

To the Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Owen Wilson, et al, on behalf of themselves and all others similarly situated, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

There were no opinions rendered in

either of the courts below. Judgments as issued are contained in Appendixes A & B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 29, 1984. A timely filed petition for rehearing en banc was denied on December 17, 1984. The Honorable Chief Justice extended the time in which to petition for a writ of certiorari to and including April 16, 1985, by Order dated March 11, 1985. Jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On January 1, 1979, a contract merging all assets of every kind was signed by one official of a 75 year old full line life, health and hospitalization Maryland insurance company. The acquiring company was an established similar company domiciled in

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North Carolina. Included in the agreement were subsidiaries of the Maryland company, a wholely owned insurance company holding corporation and a more than 90% controled full line health, life and hospitalization insurance domiciled in Washington, D.C. In addition, a third full line line insurance company of the exact same type, also domiciled in Maryland, was included in the transaction but not as a direct integral part of the January contract.

All insurance companies acquired were direct horizontal competitors to the acquiring company on an interstate basis. A kind of very low cost health, hospitalization and life insurance not readily available anywhere was offered by acquired companies. This source was eliminated on merger. The acquired parent company ceased to exist as an insurance company after merger. Included in the contract of merger was the word "reinsurance",

which was a misnomer. This was in no way reinsurance as defined in the industry.

The Maryland Insurance Commissioner approved the acquisition even though the Maryland regulation cited by him did not provide for interstate transactions of this kind. On appeal the Commissioners' approval was not reviewed by the courts owing to a simple procedual matter involving filing a petition of appeal out of time.

Suit was filed in the United States District Court of Washington, D. C., November 12, 1980. The complaint included additional points but the most significant one concerned the interpretation of the interstate antitrust aspects, viz: the McCarran-Ferguson Act amendment to the Sherman Act. The District Court ruled on the case by order dated June 30, 1983, granting defendant's motion to dismiss with no hearing of any kind. A foot note

to the order denied every aspect of plaintiffs claim. Plaintiffs filed an appeal to the United States Court of Appeals for the District of Columbia on the 20th of July, 1983. Briefs were filed and the case was argued October 24, 1984, on 15 minute intervals by opposing attorneys. After affirming the lower courts order petitioners sort a rehearing en banc, which was denied by the Court of Appeals by order of December 17, 1984.

REASONS FOR GRANTING PETITION

Clarification of the current effect of the McCarran-Ferguson Act amendment to the Sherman Act, as amended, is of prime importance to the nation as well as to petitioners case. Petitioners contend that the intercompany contract of 100% merger, triggering their legal action, that included the word "reinsurance", apparently the basis for the District Courts ruling owing to the McCarran-Ferguson exemption that applies to some types of "business of

insurance", is clearly "business of insurance companies", not now considered exempt from federal antitrust action. Further, that the same interpretation can be applied to the giants of the health care industry, viz: Blue Cross and Blue Shield, where the lives of millions of citizens and billions of dollars are involved. Granting certiorari in this case could be of great importance to this nation as a whole.

The distinction between "business of insurance" and "business of insurance companies" was first recognized and defined by this Court in S.E.C. v. Variable Annuity insurance Co. 359 U.S. 65, and further narrowed in S.E.C. v. National Securities Inc., et al, 393 U.S. 453. "Business of insurance companies" was separated from the McCarran exemption in Group Life & Health Insurance Co. v. Royal Drug Co. 99 S. Ct. 1067 and followed in U.S. v. Title Ins. Rating Bureau of Arizona, Inc. 700 F2, 1247.

Since the enactment of the McCarran-Ferguson Act, March 9, 1945, Pub. L. No. 79-115, 59 Stat 33, and the broad Federal Health Insurance program in 1965, the health care industry has expanded tremendously under the umbrella of the McCarran exemption, growing into the largest monopoly of its kind known in this country. Health care costs have exploded within the past two decades far beyond anyones belief. Premium income received by the Blue Cross and Blue Shield now exceeds all health insurance premiums collected by over 1,000 private companies. This does not include "pass through" funds in billions of dollars supplied by the United States Government to the "Blues" as fiscal intermediaries state wide and the District of Columbia to help administer payments to providers, all supplying tremendous market power and control.

There have been many suits by private insurance companies and others claiming

antitrust violations against the "Blues" but, though this particular situation was not contemplated by the framers of the McCarran Act in 1945, the courts held in the early days that the Act gave blanket protection as long as remotely collateral action was not involved. The "Blues" have had these advantages with which to expand but now it appears that their protection under the McCarran no longer exists, a factor in need of final resolution most sorely. Over the years the monopolistic control was significant.

Reimbursement for medical expenses under federal laws, Medicaid and Medicare, at the beginning, 1966, was guaranteed at any price. Beneficiaries under the federal programs were free to obtain medical service anywhere and payment was certain. As need for some control over costs became very obvious Congress imposed many restrictive laws, in addition state legislatures tried to assist but all to little or

no avail. As some costs were reduced or controled to some degree, peer groups, who operated the "Blues" worked out ways to keep costs rising.

The review system of medical service existing throughout the nation was and is composed of members of the health care entities, Ratino v. Medical Servic of D.C. 718 F2, 1260.(1983) State of Arizona v. Maricopa City 102 S. Ct. 2466(1982) The idea was to depend on this peer group to control costs and provide better medical service, but it had the exact opposite effect.

The most effective solution for members of the professional health care group to maintain and enhance their income in reaction to the costs cutting efforts of governmental bodies was to resort to the most costly method to solve a given diagnosed assumed medical problem, even when there was a clear uncertainty as to a real

need or where more simplistic methods could prove just as effective, and in most cases, much less risk to life and limb. It was, and is now to a great degree, a simple matter on peer recommendation to obtain ready increases in premium rates, and with proper certification, payment from the Federal Government, with no challenge from anyone. Costs continued to esculate under this plan, but unfortunately so did death, permanent patient impairment, needless pain, suffering and mental anguish, along with added economic hardship as beneficiaries had to assume added costs under new government cost containment programs.

One recent example of a single surgical operation that received some notoriety. Annual number of operations performed just after federal entitlement programs: None. Total completed for year 1983; 191,000, with average cost of over $25,000. each, increasing to as high as over $100,000. each in some cases. Annual total of over

$5 billion, increasing yearly with a high death rate and a very poor record of effective succes. "Coronary Bypass Surgery: Remedy or Racket?", Thomas A. Preston, M.D. Chief cardiologist at Pacific Medical Center.

Virtually every cost esculatable has met this same fate including high cost equipment, earnings of some assistants over $500,000. annually, unnecessary costly added tests etc. Health care industry is now the second largest in the nation and the fastest growing component of federal spending, it now consumes about 11% of the total Federal Budget. Health Insurance Assocation of America, Washington, D. C.

In view of the profound effect it has on the financial stability and future of the National Debt, a clear resolution of the interpretation of the monopoly causing McCarran Act, as it applies to the health care industry and to the analogous position of petitioners' case, takes a significant

position of importance.

Congress has recently made strengthening of competition in the health service industry a matter of national priority and had directed that special consideration be given throughout the planning process to the importance of maintaining and improving competition in the health industry.
Kartel v. Blue Shield of Mass. 592 F2, 1191.
The United States Government now provides health insurance for over 47,000,000 people, over 20% of the total population and growing.
W. C. Grace Report to Congress.

Legislation, though extensive, has not been very effective. Independent health, hospitalization and life insurance companies are fully equipped to cope with cost esculation control. Peer groups in control of the "Blues" would be facing medical staffs with proven cost containment methods coupled with stored logic in massive computer banks monitoring all claims in depth with effective statistical support for all action taken.

any needless or groundless esculation in costs, such as unnecessary,dangerous high cost operations or other services, would be quickly refuted unless meaningful proof was developed as proper diagnosis, etc. Technology Today & Tomorrow; Taking Control of Health Care Costs". Richard J. Sampson.

Owing to application of closer guide lines established by this Court in Union Labor Life Ins. Co. v. Perino 102 S. Ct.3002, subsequent to Group Life & Health Ins. Co. v. Royal Drug Co. supra, which narrowed further the McCarran exemption, there may have been some indication of some competitive forces working in the past year, in that the percentage of annual increase in health care costs to the Federal Government has shown a small decrease. Natl. Law Journal, 2/18/85 The legislated prospective payment plan also seems to have had some slight effect, however, the contribution by recipients has also increased. Congress soon found that the health care industry did not respond

to classic market place forces. National Gerimedical Hosp. & Geron. Ctr. v. Blue Cross of Kansas City 101 S. Ct. 2415. In this case antitrust immunity was held not justified by the facts, even where an industry is regulated substantially this did not necessarily evidence an intent to repeal antitrust laws.

As recognized in American Journal of Law & Medicine, Vol. 7, No. 4, Winter, 1982, after a general review of the health care problem it concluded, "preliminary indications from federal courts are that the real revolution, or at least the first revolution, in the health care service may come not from a national health plan but from forceful application of antitrust laws."

Indications are that opening the health care field to effective competition is all that is needed to control costs and provide better and safer service for citizens. Massive legislation has not done the job.

CONCLUSION

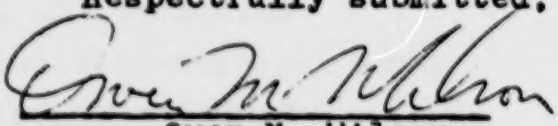
In compliance with the Courts' rule for brevity consideration of much of the added material applicable to the question presented has been very limited. There are facts and statistics to verify and confirm points covered in depth. Granting of certiorari to petitioners, who believe their case to be an example of the importance of the McCarran exemption permiting monopolistic control of the health insurance and care industry as it affects them as well as the nation, could permit a review and resolution of this question.

The McCarran Act was enacted nearly 40 years ago simply to clarify state regulation and taxation of insurance companies, providing some limited exemption from the Sherman Act. Many changes have taken place. There was no comparable condition then as now, in so far as the health care industry is concerned. While it is true that some

restraint has been imposed on the scope of its exemption, until a clear definition as applied to present day conditions is established, permiting free compitition the nation will continue to be hurt economically and its citizens will suffer greater physical, mental and financial problems.

Petitioners contend that the more than six violations of the Sherman Act in their case are not within the McCarran exemption as interpreted in recent decisions of this Honorable Court.

Respectfully submitted,



Owen M. Wilson

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CERTIFICATE OF SERVICE

This is to certify that a copy of the aforegoing Petition for a Writ of Certiorari has been mailed, postpaid, this _____ day of _____, 1985, to the following attorneys of record:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OWEN WILSON, et al,
Plaintiffs
v. . No. 80-2890

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, et al
Defendants
Civil Action

O R D E R

This matter is presently before the Court on defendants' motions to dismiss plaintiffs' complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. Plaintiff has opposed these motions.

After careful consideration of the motions, oppositions thereto, replies, memoranda of points and authorities, administrative record, detailed findings and orders issued by the Maryland Insurance Commissioner, the Court concludes that plaintiff's action lacks merit, and therefore must be dismissed.*

In view of the above, it is this 30th day of June, 1983, hereby

ORDERED that defendants' respective

motions to dismiss are GRANTED, and it is further

ORDERED that plaintiff's complaint is dismissed with prejudice.

(s)

John Garrett Penn
United States District Judge

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* The Court concludes that: (1) plaintiffs' complaint represents a meritless collateral attack upon the findings and conclusions issued by the Maryland Insurance Commission; (2) the McCarran-Ferguson Act, 15 U.S.C. Sec 1011, et seq., exempts the reinsurance transaction of which plaintiffs complain from federal antitrust laws; (3) federal securities laws have no application to claims found in plaintiffs' complaint; (4) plaintiffs have failed to cite the Court any federal "civil right" respecting the method of paying insurance premiums; and (5) plaintiffs' remaining claims are equally unpersuasive.

(Not to be published - see local Rule 8(f)

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 83-1797 September Term, 1984
Civil Action No. 80-02890

Owen Wilson, et al.,
on behalf of themselves
and all others similarly
situated,
Appellants

v.

North Carolina Mutual Life
Insurance Co. of Durham, a
North Carolina Corp., et al

Filed Oct 29, 1984

Geo. A. Fisher
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Edwards and Starr, Circuit Judges, and McGowan, Senior Circuit Judge

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court,

that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after dispostion of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expeditied issuance of the mandate for good cause shown.

Per Curiam
For the Court
(s)
George A. Fisher
Clerk

APPENDIX

STATUTES: Amendments to Sherman Act

15 U.S.C. Section 18

ACQUISITION BY ONE CORPORATION OF STOCK OR ASSETS OF ANOTHER

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire

the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from (15 U.S.C. 79j), the United States Maritime Commission, or the Secretary of

Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

15 U.S.C. Section 19

INTERLOCKING DIRECTORATES AND OFFICERS

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000. engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director

under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in owning and holding all or a part of the stock of

such susidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line construction by the independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein nor to prevent such common carrier from extending any of its line through the medium of the acquisition of stock or

otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein so acquired.

Nothing contained in this section shall be held to affect or impair any right theretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust lasw or to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the

exercise of its jurisdiction under section 10 of the Public Utility Holding Co-pany Act of 1935 the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

15 U.S.C. Sections 1011-1012-1013

McCarran-Ferguson Act

Section 1011: Declaration of Policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012: Regulation by State law, applicability of certain Federal laws after June 30, 1948

(a) The busines of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business,

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 1012: Suspension until June 30, 1948, of application of certain Federal laws: Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SUPREME COURT OF THE UNITED STATES

No. A-676

OWEN WILSON, ET AL

Applicants

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE CO. OF DURHAM, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 16, 1985

(s) Warren E. Burger

Chief Justice of the United States

Dated this 11th day of March, 1985